Supreme Court, U.S.
FILED

98- 981080 JAN 4 - 1999

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

VLASIC FOODS INTERNATIONAL, INC.

Petitioner,

v.

IRMA D. DEFOREST, EXECUTRIX OF THE ESTATE OF JIM ZENDER, AND OF JIM ZENDER, D.B.A. "Z" TOMATO COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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202-966-1962

Counsel for Petitioner

48 PP

QUESTIONS FOR REVIEW

1. As a matter of Federal law and procedure, can a corporation which had its corporate powers suspended during the time for noticing its appeal, and during the entire pendency of the appeal, retroactively confer jurisdiction on a Court of Appeal by reviving its corporate powers after the case is remanded to the District Court?

2. Does a federal court have jurisdiction to hear claims of an individual after final judgment against him, when on appeal, he is named neither in the caption nor the body of the notice of appeal, and where the individual has been doing business as a corporation?

3. Can a valid judgment be based upon the premise that the defendant should have ignored a federal tax lien?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal were:

Petitioner, Vlasic Foods International, Inc. ("Vlasic").

Respondent is Irma D. DeForest, Executrix of the Estate of Jim Zender, and of Jim Zender, d.b.a. "Z" Tomato Company, Inc.

RULE 29.6 STATEMENT

Vlasic has no parent company or nonwholly owned subsidiary. It should be noted that on March 30, 1998, one share of Vlasic, no par value common stock, was distributed to shareowners of Campbell Soup Company ("Campbell") for every ten shares of Campbell stock held by such shareowners at the record date in a tax-free distribution. At the time of distribution, Vlasic began operations as a separate independent publicly owned company. Before the record date, Vlasic was a wholly owned subsidiary of Campbell.

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OPINIONS BELOW

The opinions of the Ninth Circuit are unpublished, but found and referenced at 91 F.3d 158 (Table), 1996 WL 406145 (9th Cir. 1996) and 156 F.3d 1236 (Table), 1998 WL 483220 (9th Cir. 1998).

STATEMENT OF JURISDICTION

1. The Ninth Circuit rendered its decision on August 12, 1998 (App.1a-4a).

2. Vlasic filed a timely petition for rehearing on September 4, 1998.

3. The Ninth Circuit denied Vlasic's petition for rehearing on October 6, 1998 (App. 7a-8a).

4. Jurisdiction to hear this petition exists under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 27, 1992, "Jim Zender dba 'Z' Tomato Company, Inc." sued Vlasic (App. 19a). "Z" filed an amended complaint on December 2, 1992 in the name of "Jim Zender and 'Z' Tomato Company, Inc." (App. 20a). "Z" filed a second amended complaint on October 12, 1993 in the name of "Jim Zender dba 'Z' Tomato Company, Inc." (App. 21a). In each complaint, Zender described himself as both an individual and corporate defendant. However, in California, when a person uses the designation "dba," California recognizes only one legal entity. Pinkerton's Inc. v. Superior Court, 49 Cal.App.4th 1342, 57 Cal.Rptr.2d 356

(1996). Under California law, only a corporation is entitled to adopt any fictitious business name which includes "Corporation," "Corp.," "Incorporated," or "Inc." California Business & Professions Code § 17910.5.

In January 1994, after a jury trial, the district court granted Vlasic's motion for judgment as a matter of law on breach of contract and bad faith denial of contract claims, and ordered a new trial on the remaining (tort) claims (App. 10a-16a). On October 5, 1994, the successor judge granted Vlasic's motion for summary judgment on all remaining claims (App. 9a).

On October 12, 1994, a Notice of Appeal was filed ("First Notice of Appeal"), captioned, "Jim Zender dba 'Z' Tomato Company Inc., Plaintiff v. Vlasic Foods, Inc., Defendant." The body of the appeal stated, "NOTICE IS HEREBY GIVEN that Jim Zender dba "Z" Tomato Company Inc. in the above case, hereby appeals to the United States Court of Appeals for the Ninth Circuit . . ." Jim Zender the individual, even if he had a recognizable legal identity apart from the corporation "Z" (which he did not have), was not named in the caption or body of the first Notice of Appeal (App. 25a-26a).

On July 19, 1996, the Ninth Circuit reversed and remanded the matter for trial. 1996 WL 406145.

Before the First Notice of Appeal was filed, on September 1, 1994, "Z" Tomato Company, Inc. was suspended as a California corporation for nonpayment of taxes (App. 22a-24a). "Z" Tomato remained suspended during the entire pendency of the first appeal. "Z" Tomato's corporate status was revived on January 22, 1997 (App. 29a). At no time did "Z" Tomato or its counsel inform the court or opposing counsel of the suspension of its corporate status.

On retrial, the central issue presented to the jury was whether Vlasic had an obligation to make a rental payment on "Z" Tomato's behalf on an agricultural lease for the fall of 1991. Before the payment was due, on May 28, 1991, the United States Internal Revenue Service served Vlasic with a Notice of Levy for Z Tomato Company Inc.'s failure to make payroll tax payments of $74,281.72 (App. 17a-18a). The Notice of Levy provided and required:

> Notice and demand, as required by the Internal Revenue Code, have been made, and the taxpayer has neglected or refused to pay. This amount is still due, owing, and unpaid. All property, rights to property, money, credits, and bank deposits now in your possession and belonging to this taxpayer (or for which you are obligated) and all money or other obligations you owe this taxpayer, are levied upon for payment of the tax, plus all additions provided by law.[1]

The district court refused to dismiss "Z" Tomato's claim as barred by its failure to file a timely appeal, and refused to dismiss Zender's individual claim as barred by his failure to appeal the adverse judgment against him. The district court denied Vlasic's Rule 50 motions to dismiss "Z" Tomato's damage claims based upon the effect of the IRS levy.

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[1] Thereafter, the only invoice that "Z" Tomato sent to Vlasic was for $17,900, with a promise that "James Zender DBA: 'Z' Tomato Company, Inc., will have no further charges or claims to Vlasic Foods, Inc. for prior cucumber production operations" (App. 309-310). Vlasic paid this amount to the Internal Revenue Service as required by the Notice of Levy.

The Ninth Circuit held that California State law governed the question of federal procedure and jurisdiction – that "Z" Tomato could retroactively "validate" the Notice of Appeal and appeal, which were invalid when filed and prosecuted (App. 2a):

> Z Tomato was able to prosecute its claim against Vlasic despite its corporate suspension during its prior appeal. California law controls the question of Z Tomato's capacity to sue. See Federal Rule of Civil Procedure 17(b); Gough v. Titus (In re Christian & Porter Alum. Co.), 584 F.2d 326, 331 (9th Cir. 1978). California law provides that revival of corporate status retroactively validates acts taken in the prosecution of a case unless the adverse party has accrued a substantive defense during the corporation's suspension. See Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 8 Cal.3d 369, 373 (1972); Welco Constr., Inc. v. Modulux, Inc., 47 Cal. App. 3d 69, 72 (Cal. App. 1975). Retroactive validation of corporate acts applies to acts taken both before and after judgment. Peacock, 8 Cal.3d at 373-74. *The California Supreme Court has determined that pursuing an appeal is a procedural step that can be retroactively validated by revivor.* [Italics added.]

The Ninth ignored Rule 3(c) and its requirement that "a notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." The Ninth Circuit held (App. 3a):

> Jim Zender identified himself as an individual party in the lawsuit pleadings and in the notice of cross-appeal. Although his captions in the lawsuit pleadings are "imprecisely worded," the text of the pleadings clearly indicate [sic] Jim Zender's intent to pursue his claims as an individual plaintiff.

The Ninth Circuit also ignored that Zender the individual lost his right to continue to sue Vlasic when he failed to appeal from the adverse judgment against him in the First Notice of Appeal. The Ninth Circuit focused only on the cross appeal after the second trial – long after Zender's individual rights had expired (App. 3a):

> Further, the captions of his cross-appeal and amended cross-appeal specifically list him as an appellant.

Among other mistakes, the Ninth Circuit ignored that the caption and notice of appeal by "Jim Zender dba 'Z' Tomato Company, Inc." signals that the *only* party is the corporation. California. Business and Professions Code § 17910.5.

The Ninth Circuit never addressed (even when asked again on Vlasic's petition for reconsideration) how Vlasic could have been required to make an agricultural lease payment on "Z" Tomato's behalf when the Internal Revenue Service had served a lien preventing any such payment.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S APPLICATION OF CALIFORNIA PROCEDURAL LAW TO ALLOW RETROACTIVE VALIDATION OF A FEDERAL NOTICE OF APPEAL THREATENS THE UNIFORMITY OF FEDERAL LAW

The Ninth Circuit decision to allow retroactive validation of a notice of appeal, applying California procedural law to the appeal in this case, threatens the uniformity of federal jurisprudence envisioned by Hanna v. Plumer, 380 U.S. 460 (1965). The decision also conflicts with this Court's decisions in Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988) and Budinich v. Becton Dickinson & Company, 486 U.S. 196 (1988) which hold that the requirements of Rules 3 and 4 of the Federal Rule of Appellate Procedure are mandatory and jurisdictional, and that the uniform application of these rules cannot, as a matter of Federal policy and procedure, be left in doubt.

Under Federal Rule of Civil Procedure 17(b), "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Under California law (under which "Z" Tomato Company, Inc. was organized), a suspended corporation may neither prosecute nor defend an action. California Revenue and Taxation Code § 23301. California courts have distinguished between substantive and procedural defenses that accrue during a period of suspension. Procedural acts may be retroactively validated under California law, but substantive defenses (such as statutes of limitations) continue to accrue and may not be retroactively validated. Welco

Construction Inc. v. Modulux Inc., 47 Cal.App.3d 69, 120 Cal.Rptr. 572 (1975).

The California Supreme Court in 1972 held that the filing of a valid and timely notice of appeal is a procedural act, which can be retroactively validated. Peacock Hill Association v. Peacock Lagoon Construction Company, supra, 8 Cal.3d 369, 503 P.2d 285 (1972).

Although California law determines whether a corporation is a person with capacity to sue, federal law determines when and how such a person must act in order for federal courts to have jurisdiction over its claim. Federal Rule of Appellate Procedure 3(c) requires that a "party" notice the appeal. Rule 4(a) requires that a "party" file notice of appeal within 30 days (in a normal civil case). These rules are mandatory and jurisdictional. Torres v. Oakland Scavenger Company, supra, Budinich, supra. Because two Federal Rules plainly apply, the Supremacy Clause demands the application of the federal rule under the Rules Enabling Act, without consideration of Erie principles or the desirability of applying contrary state law. Hanna v. Plumer, supra.

Although the Ninth Circuit did not apply the analysis of its Olympic Sports Products, Inc. v. Universal Athletic Sales Company, 760 F.2d 910 (9 Cir. 1985), *cert. denied*, 474 U.S. 1060, the confusion of that case informed its decision. Alone among the circuits, the Ninth Circuit has grafted an additional layer of analysis upon the clarity of Hanna v. Plumer. Even where a federal rule applies and is within the scope of constitutional power and the Rules Enabling Act, the Ninth Circuit requires an additional determination of whether "Erie considerations are so strong that they can justify interrupting the normal function of the federal court processes." 760 F.2d at 914-915. See Wright

and Miller, Federal Practice & Procedure § 4508 (Supp.) (1998). The Ninth Circuit's improper bias toward the "prerogatives of state law against incursions by a Federal Rule" informed its decision to allow state law retroactively to validate an invalid appeal long after the notice of appeal and the entire appeal period had passed.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT IGNORED THE PLAIN LANGUAGE OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND THIS COURT'S DECISIONS DO NOT ALLOW AN APPEAL BASED UPON AN IDENTIFCATION OF THE PUTATIVE APPELLANT IN THE "LAWSUIT PLEADINGS" AND A LATER APPEAL

After final judgment was entered against both Jim Zender and Jim Zender dba "Z" Tomato Company Inc., the October 12, 1994 notice of appeal listed only "Jim Zender dba 'Z' Tomato Company Inc. in the caption and the body of the appeal. Federal Rule of Appellate Procedure 3(c) mandates "A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." Even though Rule 3(c), as amended in 1993, allows appellants to be generally described as "all plaintiffs" or "et al.", there must be some designation of the party taking the appeal in the body or caption. The requirements remain mandatory and jurisdictional. Torres, Budinich, supra.

The Ninth Circuit ignored Zender's failure to appeal from the judgment against him, and held that his cross-appeal on the second appeal and his "lawsuit pleadings" were sufficient to validate the first appeal.

> Jim Zender identified himself as an individual party in the lawsuit pleadings and in the notice of cross-appeal. Although his captions in the lawsuit pleadings are "imprecisely worded," the text of the pleadings clearly indicate Jim Zender's intent to pursue his claims as an individual plaintiff.

The Ninth Circuit decision so far departs from the plain language of the Federal Rule and this Court's decisions in Torres and Budinich that certiorari should be granted.

III. THE NINTH CIRCUIT DECISION IS BASED UPON THE PREMISE THAT VLASIC SHOULD HAVE IGNORED A FEDERAL TAX LIEN, A DECISION THAT SO FAR DEPARTS FROM FEDERAL POLICY AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

This Court has long recognized that "collection of taxes is vital to the functioning, indeed existence, of government cannot be denied." United States v. Kimball Foods, Inc., 440 U.S. 715 (1979). The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. Id. The policy of enforcing Federal tax liens overrides state filing laws. United States v. Union Central Life Insurance Company, 368 U.S. 291 (1961).

The Ninth Circuit decision contradicts this important national policy and requires the exercise of the Court's supervisory power. "Z" Tomato Company Inc. did not pay its federal payroll taxes. On May 28, 1991 the United States Internal Revenue Service served Vlasic with a Notice of Levy for Z Tomato Company Inc.'s failure to make payroll tax payments of $74,281.72 (App. 329). The Notice of Levy provided that "all money or other obligations you owe this taxpayer, are levied upon for payment of the tax, plus all additions provided by law. "Z" Tomato Company's damage claim depended upon the premise that Vlasic should have ignored the IRS Levy and made the agricultural lease payment anyway.[2]

Vlasic could not have ignored the IRS Levy. Vlasic could not have paid "Z" Tomato's lease. "Z" Tomato could not have performed and was not entitled to damages.[3]

CONCLUSION

In Europe during the Fourteenth Century, two kings claimed the thrones of England and France, three popes purported to reign, and periodically the plague would erupt. Hardly a harmonious federal system. One might think it the

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[2] Vlasic paid the IRS on the only invoice it received from "Z" Tomato after being served with the Levy.

[3] California law requires a plaintiff in a contract action to prove, even in cases of anticipatory breach, that it had the ability to perform. The plaintiff has the burden of proof on the issue. Ersa Grae Corporation v. Fluor Corporation, 1 Cal.App.4th 613, 624-625, 2 Cal.Rptr.2d 288 (1991).

model for the Ninth Circuit, however, as it ignores federal uniformity on issues of jurisdiction and taxation.

A writ of certiorari should be granted to correct the Ninth Circuit's departure from accepted and important issues of federal law.

Dated:

Forrest A. Hainline III
5335 Wisconsin Ave. NW
Suite 440
Washington, DC 20015
202-966-1962

Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56303
D.C. No. CV-92-00455-IEG

IRMA D. DeFOREST, Executrix of the Estate of
JIM ZENDER, and of JIM ZENDER,
Doing Business as "Z" Tomato Company, Inc.,[1]
Plaintiff-Appellee,

v.

VLASIC FOODS, INC.,
Defendant-Appellant.

No. 97-56304
D.C. No. CV-92-00455-IEG

IRMA D. DeFOREST, Executrix of the Estate of
JIM ZENDER, and of JIM ZENDER,
Doing Business as "Z" Tomato Company, Inc.,
Plaintiff-Appellee,

v.

VLASIC FOODS, INC.,
Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted August 4, 1998
Pasadena, California

[stamp—FILED; AUG 12 1998; CATHY A. CATTERSON, CLERK;
U.S. COURT OF APPEALS]

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[1] Irma D. DeForest, Executrix of the Estate of Jim Zender, is substituted for and on behalf of Jim Zender and Z Tomato Co., Inc. pursuant to Fed. R. Civ. P. 25(a).

MEMORANDUM **

Before: REINHARDT, TROTT, and T.G. NELSON, Circuit Judges.

Vlasic Foods, Inc. (Vlasic) appeals the jury's verdict and several of the district court's decisions. Jim Zender and Z Tomato cross-appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

The facts are known to the parties and will not be repeated here.

A. Individual and Corporate Standing

1. Corporate Standing

Z Tomato was able to prosecute its claims against Vlasic despite its corporate suspension during its prior appeal. California law controls the question of Z Tomato's capacity to sue. *See* Fed. R. Civ. P. 17(b); *Gough v. Titus (In re Christian & Porter Alum. Co.)*, 584 F.2d 326, 331 (9th Cir. 1978). California law provides that revival of corporate status retroactively validates acts taken in the prosecution of a case unless the adverse party has accrued a substantive defense during the corporation's suspension. *See Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*, 8 Cal. 3d 369, 373 (1972); *Welco Constr., Inc. v. Modulux, Inc.*, 47 Cal. App. 3d 69, 72 (Cal. Ct. App. 1975). Retroactive validation of corporate acts applies to acts taken both before and after judgment. *Peacock*, 8 Cal. 3d at 373-74. The California Supreme Court has determined that pursuing an appeal is a procedural step that can be retroactively validated by revivor. *See ABA Recovery Serv., Inc. v. Konold*, 198 Cal. App. 3d 720, 725 n.2 (Cal. Ct. App. 1988).

** This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

2. Zender's Ability to Proceed as an Individual

Jim Zender identified himself as an individual party in the lawsuit pleadings and in the notice of cross-appeal. Although his captions in the lawsuit are "imprecisely worded," the text of the pleadings clearly indicate Jim Zender's intent to purse his claims as an individual plaintiff. Further, the captions of his cross-appeal and amended cross-appeal specifically list him as an appellant. Therefore, we conclude that Jim Zender was not and is not barred from prosecuting his claims or cross-appeals against Vlasic. *See Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991).

B. Fraud Claims

Assuming arguendo that the doctrine of collateral estoppel bars retrial of legal issues in the same lawsuit, we nonetheless reject Vlasic's argument that collateral estoppel applies in this case. The doctrine of collateral estoppel applies when identical issues were previously decided in a prior proceeding. *See Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992). The issue of fraud by promise without intent to perform is not identical to the issues of fraud by misrepresentation or concealment.

In addition, the jury's special verdict is also internally consistent. The Seventh Amendment requires courts to respect a special verdict whenever "there is a view of the case that makes the jury's answers to special interrogatories consistent." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364 (1962). Based on the evidence at trial, the jury could have found that Vlasic intentionally misrepresented or concealed facts in order to induce Jim Zender and Z Tomato to enter into the long-term crop and related contracts, and still found that Vlasic intended to perform at least some of the long-term crop contract.

The district court did not err by denying Vlasic's motions for summary judgment. There were material issues of fact regarding Vlasic's alleged misrepresentation or concealment.

The parties disputed whether Jim Zender knew that Vlasic was pulling out of Blythe, whether Jim Zender and Z Tomato would have entered into the land lease if Vlasic had told them of its intentions to pull out of Blythe after one crop, and whether Schwab misrepresented Vlasic's intentions to financially back Jim Zender's and Z. Tomato's crop-related lease and purchase contracts.

C. The Jury's Verdict and Damages Award

The jury's verdict and damages award were supported by substantial evidence. *See Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). The jury could have reasonably concluded from the evidence that Jim Zender's and Z Tomato's damages were caused by Vlasic's breach of contract, misrepresentation, and concealment. Further, the jury had substantial evidence on which to rely when it found that Jim Zender and Z Tomato did not engage in fraud, and therefore were not liable to Vlasic under RICO.

D. Reinstatement of Compensatory Damages

Federal law still requires a retrial on the issues of liability and compensatory and punitive damages when the issues are interwoven. *See United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir. 1961). Therefore, the district court did not err in requiring a retrial on all issues.

E. Interference with Prospective Economic Advantage

We affirm the district court's dismissal on summary judgment of Jim Zender and Z Tomato's claim for interference with prospective economic relations. Vlasic's decision to terminate its operation in Blythe was not designed to disrupt Zender and Z's contractual relationships with other parties. *See Arntz Contract. Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 475 (Cal. Ct. App. 1996).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 92-455-IEG (POR)

JIM ZENDER and "Z" TOMATO COMPANY, INC.,

Plaintiffs,

v.

VLASIC FOODS, INC.,

Defendants.

[stamp—FILED; JUN 23 1997; Clerk, U.S. DISTRICT COURT; SOUTHERN DISTRICT OF CALIFORNIA; /s/ J. Larioletti]

JUDGMENT

JUDGE: Irma E. Gonzalez

This action came on for trial before the Court and jury, Honorable Irma E. Gonzalez, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED,

That the Plaintiffs JIM ZENDER and "Z" TOMATO COMPANY, INC. recover of the Defendant VLASIC FOODS, INC., the sum of Seven Hundred Thirteen Thousand Three Hundred Dollars ($713,300), with interest thereon as allowed by law and at the percent as provided by law and Plaintiffs' cost of action.

Dated: 6/23/97

/s/ Irma E. Gonzalez
IRMA E. GONZALEZ
Judge of the District Court

APPROVED AS TO FORM:

BACALSKI, BYRNE & KOSKA

Dated: 6-18-97 By: /s/ A. Daniel Bacalski, Jr.
A. DANIEL BACALSKI, JR., ESQ.
KERRY F. O'SULLIVAN, ESQ.
Attorneys for Plaintiff
JIM ZENDER and
"Z" TOMATO COMPANY, INC.

Dated: 6-17-97 By: /s/ Forrest A. Hainline, III
FORREST A. HAINLINE, III, ESQ.
CHRISTIAN F. DUBIA, JR., ESQ.
Attorneys for Defendant
VLASIC FOODS, INC.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56303
D.C. No. CV-92-00455-IEG

IRMA D. DeFOREST, Executrix of the Estate of
JIM ZENDER, and of JIM ZENDER,
Doing Business as "Z" Tomato Company, Inc.,*
Plaintiff-Appellee,

v.

VLASIC FOODS, INC.,
Defendant-Appellant.

No. 97-56304
D.C. No. CV-92-00455-IEG

IRMA D. DeFOREST, Executrix of the Estate of
JIM ZENDER, and of JIM ZENDER,
Doing Business as "Z" Tomato Company, Inc.,[1]
Plaintiff-Appellant,

v.

VLASIC FOODS, INC.,
Defendant-Appellee.

ORDER

[stamp—FILED; OCT - 6 1998; CATHY A. CATTERSON, CLERK;
U.S. COURT OF APPEALS]

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* Irma D. DeForest, Executrix of the Estate of Jim Zender, is substituted for and on behalf of Jim Zender and Z Tomato Co., Inc. pursuant to Fed. R. Civ. P. 25(a).

Before: REINHARDT, TROTT, and T.G. NELSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing, and have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 92-455-G (IEG)

JIM ZENDER dba "Z" TOMATO COMPANY, INC., Plaintiff,

vs.

VLASIC FOODS, INC., Defendant.

[stamp—FILED; OCT - 5 1994; CLERK, U.S. DISTRICT COURT; SOUTHERN DISTRICT OF CALIFORNIA]

ORDER GRANTING SUMMARY JUDGMENT

DATE: September 6, 1994
TIME: 10:30 a.m.
COURTROOM: 11
JUDGE: Gilliam/Gonzalez (trial)

The motion of Defendant VLASIC FOODS, INC. for summary judgment came on for hearing before this Court, A. Daniel Bacalski, Jr., appearing for Plaintiff, and Christian F. Dubia, Jr., appearing for Defendant. After consideration of the briefs and arguments of counsel, and all other matters presented to the Court, and incorporating by reference the Transcript of Defendant's Motion for Summary Judgment Before the Honorable Irma E. Gonzalez, U.S. District Court Judge,

IT IS HEREBY ORDERED that Defendant's motion for summary judgment is GRANTED.

DATED: OCT 03 1994

IRMA E. GONZALEZ
U.S. DISTRICT COURT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 92-455G (POR)

JIM ZENDER d/b/a "Z" TOMATO COMPANY, INC.

v.

VLASIC FOODS, INC.

[Clerk's stamp—JAN 24 1994; U.S. DISTRICT COURT; SOUTHERN DISTRICT; OF CALIFORNIA; /s/ LM]

RULING ON MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

Plaintiff brought this action in March, 1992, alleging breach of contract, bad faith denial of contract, intentional interference with economic relationships, promise without intent to perform, fraudulent misrepresentation, and fraudulent concealment. In October, 1993, a jury returned a verdict in his favor and awarded general and punitive damages. Defendant has filed a post-trial motion for judgment as a matter of law or, in the alternative, for new trial. For the reasons set forth below, the court will grant the motion for judgment as a matter of law in part and order a new trial.

FACTS

Defendant, Vlasic Foods, Inc. ("Vlasic"), is a large pickle and pepper producing company. Vlasic contracts with growers in different regions to obtain its supply of cucumbers and peppers. Vlasic's Agricultural Field Manager for the Western Region is Jerry Schwab ("Schwab").

Plaintiff, Jim Zender ("Zender"), has been in the agriculture business for over twenty years. He is the sole shareholder of "Z" Tomato Company. In 1987, Vlasic began an experimental agricultural program in Blythe, California, to determine the commercial feasibility of growing cucumbers during the spring and fall crop seasons. Vlasic retained Zender to conduct the Blythe program. Initially, Zender subtracted with two local farmers to grow the crops, but later undertook the growing responsibilities himself.

Over the next three and one-half years, Zender and Vlasic entered into written contracts on a crop-by-crop basis for the production of both hand and mechanically harvested cucumbers. The parties executed the following prior to each growing season: (1) mechanical harvest pickling cucumber agreement; (2) production and services agreement; (3) management supervisory agreement; (4) receiving station contractor's agreement; (5) harvester lease agreement; and (6) equipment lease agreement. These contracts covered all aspects of production and supervision for each crop season, contained integration clauses, and were always limited to a specific crop season.

During the spring of 1990, Zender and Schwab discussed the possibility of Zender leasing a farm for five years. Zender negotiated a two and one-half year lease of Tiscornia Farm, located in Blythe. Zender forwarded the lease to Schwab for Vlasic's approval and requested that Vlasic provide Zender with a letter of intent to continue the Blythe cucumber program for the term of the lease. In November, 1990, Schwab sent the lease to Vlasic's corporate offices in Detroit, Michigan.

Vlasic neither sent a letter of intent nor signed the lease. Zender alleges that on December 21, 1990, Schwab informed him that Vlasic had decided to proceed with the

program for two and one-half years. On December 27, 1990, Zender executed the two and one-half year lease for Tiscornia Farm. Vlasic wired plaintiff approximately eighty thousand dollars to prepay rent for the spring, 1991, crop season. On January 30, 1991, Vlasic and Zender executed a series of written contracts, similar to those entered into before all previous crop seasons, limited to the spring, 1991, crop season. Except for the Management Service Agreement, each agreement contained an integration clause.

In July, 1991, Vlasic informed Zender that it had decided to cancel the Blythe pickle operation. Plaintiff brought the present action. In October, 1993, a jury found that Vlasic had entered into and then breached an oral contract. Additionallly, the jury found that Vlasic had in bad faith denied the existence of the oral contract and that it had engaged in fraudulent activity.

DISCUSSION

A judgment as a matter of law "is proper if the evidence construed in the light most favorable to the nonmoving party permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's; it is improper if reasonable minds could differ over the verdict." *Fleming v. Department of Public Safety*, 837 F.2d 401, 408 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). A judge may order a new trial if the verdict is against the clear weight of the evidence. In reaching its conclusion, a court can "weigh the evidence and assess the credibility of witnesses, and need not view the evidence . . ." in the light most favorable to the nonmoving party. *Landes Constr. Co. Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987).

In support of its motion for judgment as a matter of law or new trial, defendant raises the parol evidence rule and statute of frauds.

Parol Evidence

California Code of Civil Procedure § 1856(a) states that "[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." When determining whether evidence of an oral agreement should go to a jury, courts look to "such questions as (1) whether the written agreement appears to state a complete agreement; (2) whether the alleged oral agreement directly contradicts the writing; (3) whether the oral agreement might naturally be made as a separate agreement; [and] (4) whether the jury might be misled by the introduction of the parol testimony." *Brawthen v. H & R Block, Inc.*, 52 Cal.App.3d 139, 146 (Cal. Ct. App. 1975). The presence of an integration clause is persuasive, if not controlling, on the issue of integration. A court may also look to all the surrounding circumstances, including prior discussions between the parties, when addressing this threshold issue. *Banco Do Brasil, S.A. v. Latian, Inc.*, 234 Cal. App.3d 973, 1002-03 (Cal. Ct. App. 1991), *cert. denied*, 112 S. Ct. 2967 (1992).

If a written agreement is integrated, a court can admit extrinsic evidence of consistent additional terms that explain or supplement the writing. This is permitted only if the extrinsic evidence is not inconsistent with the terms of the integration. *Alling v. Universal Mfg. Corp.*, 5 Cal.App.4th 1412, 1435 (Cal. Ct. App. 1992). "The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be ambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.'" *Winet v. Price*, 4 Cal.App.4th 1159, 1165 (Cal. Ct. App. 1992) (quoting *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 37 (1968)).

Consistent with the practice followed in the previous crop seasons, the series of contracts entered into on January 30, 1991, covered all aspects of the parties relationship for a particular crop season — in this instance, spring, 1991. Four of the agreements contained integration clauses. All of them expressly terminated on or before July 31, 1991. The alleged oral contract was for a term of two and one-half years. This is directly contrary to the written agreements executed by the parties. The written agreements were comprehensive and not ambiguous with respect to duration. The parol evidence is not relevant to prove a meaning to which the language of the written agreements is reasonably susceptible. Given this conclusion, the parol evidence rule is an absolute bar to evidence of the alleged oral contract. Without this evidence, the plaintiff does not have a claim for breach of oral contract or for bad faith denial of contract. The jury could have properly rested its verdict on plaintiff's claims of intentional interference with economic relationships, fraudulent concealment and misrepresentation, and promise without intent to perform. It is impossible to know what portion of the general damages the jury intended as compensation for the breach of contract it found or what portion of punitive damages it intended to allocate as compensation for the bad faith denial of contract it found.

Statute of Frauds

The result would be the same under the statute of frauds, which requires that a contract not performable within a year be in writing. Cal. Civ. Code § 1624; Cal. Commercial Code § 2201 (requires contract for sale of goods).[1] In this case, plaintiff is attempting to enforce a two and one-half

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[1] This case involves an alleged oral contract for the sale of goods — cucumbers. *Mosekian v. Davis Canning Co.*, 229 Cal.App.2d 118 (Cal. Ct. App. 1964).

year oral agreement. The statute of frauds plainly bars such a contract. The estoppel exception does not apply to this action. *Monte Carlo Motors, Inc. v. Volkswagenwerk*, 177 Cal.App.2d 107, 110 (Cal. Ct. App. 1960) (agent's representation not sufficient to estop reliance on statute of frauds; "estoppel can only arise out of reasonable reliance upon some conduct of the principal himself.")

Additionally, the equal dignities rule would bar this action. Cal. Civ. Code § 2309 states that "authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Neither party submitted evidence at trial that Vlasic gave Schwab written authorization to enter into a two and one-half year relationship with Zender. This is fatal to plaintiff's contract claims.[2] Again, estoppel is not an exception available to Zender. There was no evidence that Vlasic either (1) lulled Zender into believing Schwab had written authorization to bind Vlasic to a long term deal or (2) accepted the benefits of the Tiscornia Farm lease with knowledge that Zender intended such benefits as part and parcel of a two and one-half year harvesting agreement. *See McGirr v. Gulf Oil Corp.*, 41 Cal.App.3d 246, 258 (Cal. Ct. App. 1974). Finally, there was no evidence presented that Vlasic led Zender to believe that it had reduced the alleged two and one-half year oral contract to writing. Cal. Civ. Code § 1623.

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[2] Zender contends that Vlasic waived the equal dignities rule by not raising it until after the trial. While true that Vlasic did not specifically raise § 2309 until after the jury verdict, it did raise in a timely fashion all issues necessary for a just determination of the applicability of this doctrine. Vlasic has consistently maintained that Zender knew that Schwab did not have authority to enter into oral contracts on behalf of Vlasic. Vlasic did not waive the equal dignities rule.

CONCLUSION

For reasons set forth above, judgment as a matter of law is GRANTED in favor of defendant on the claims of breach of contract and bad faith denial of contract. A new trial is ORDERED on the remaining claims.

Dated this 20th day of January, 1994, at San Diego, California.

/s/ Warren W. Eginton
Warren W. Eginton, Senior U.S. District Judge

APPENDIX F

JOINT EXHIBIT 90

Form 668-A(C)
(Rev. July 1989)

Department of the Treasury–Internal Revenue Service

Notice of Levy

Date	District:	Telephone Number of IRS Office
May 28, 1991	Laguna Niguel District	(619) 352-6404

Name and Address of Taxpayer
Z TOMATO COMPANY INC
DRAWER Q
BLYTHE, CA 92225

TO: VLASIC FOOD INC.
33200 W 14 MILE ROAD
BLOOMFIELD, MI 48322

REPLY TO:
Internal Revenue Service
P.O. Box 3370
El Centro, CA 92244

Identifying Number(s)
94-2832447

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
943	12-31-89	20,342.20	3,733.30	24,075.50
943	12-31-90	47,604.95	2,601.27	50,206.22

THIS LEVY WILL NOT ATTACH TO ANY INDIVIDUAL RETIREMENT ACCOUNT (IRA), RETIREMENT PLAN BENEFITTING SELF-EMPLOYED INDIVIDUALS, OR ANY OTHER QUALIFIED PLAN IN YOUR POSSESSION OR CONTROL.

Total amount due 74,281.72

Interest and late payment penalty have been figured to June 30, 1991

Chapter 64 of the Internal Revenue Code provides a lien for the above tax and statutory additions. Notice and demand, as required by the Internal Revenue Code, have been

made, and the taxpayer has neglected or refused to pay. This amount is still due, owing, and unpaid. All property, rights to property, money, credits, and bank deposits now in your possession and belonging to this taxpayer (or for which you are obligated) and all money or other obligations you owe this taxpayer, are levied upon for payment of the tax, plus all additions provided by law. Demand is made on you either to pay this tax liability or pay any smaller amount that you owe this taxpayer.

Money on deposit at banks, credit unions, savings and loans, and similar institutions described in section 408(n) of the Internal Revenue Code must be held for 21 days from the day you receive this levy before is it sent to us along with any interest the taxpayer will earn during that time. In all other cases, you must turn over the taxpayer's property, money, credits, etc. just as though the taxpayer had demanded it.

Please make your check or money order payable to the Internal Revenue Service. Write on your payment the taxpayer's name, the identifying number(s), kind of tax, and tax period shown above, and the words "LEVY PROCEEDS". Complete the back of Part 2 of this form and mail it to us with your payment in the enclosed envelope. Keep Part 1 for your records and give Part 3 to the taxpayer within 2 work days. If you do not owe funds to this taxpayer, please complete the back of Part 2 and return all copies in the enclosed envelope. Make reasonable efforts to identify all accounts in the taxpayer's name using Address, Social Security, and/or Employer ID number as a minimum. Do not offset funds the Taxpayer owes you without contacting the IRS Office shown above by phone for instructions.

Signature of Service Representative	Title
/s/ S[illegible] S. Servin	
S.S. SERVIN	Revenue Officer

APPENDIX G

A. DANIEL BACALSKI, JR.
STATE BAR NO. 056488
DAVID R. CATALINO
STATE BAR NO. 144552
BACALSKI, PRINDLE & BYRNE
Attorneys at Law
225 Broadway, Suite 1200
San Diego, California 92101
(619) 239-4340

Attorneys for Plaintiff JIM ZENDER dba "Z" TOMATO COMPANY, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Number 92-455 G (P)

JIM ZENDER dba "Z" TOMATO COMPANY, INC., Plaintiff,

vs.

VLASIC FOODS, INC., Defendants.

[stamp—FILED; ??? 7 1992; CLERK U.S. DISTRICT COURT; SOUTHERN DISTRICT OF CALIFORNIA]

COMPLAINT FOR BREACH OF CONTRACT AND INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND DEMAND FOR JURY TRIAL

I

THE PARTIES

1. Plaintiff JIM ZENDER ("ZENDER") is, and at all times herein mentioned, an individual residing in the State of California. At all times he was the owner of "Z" TOMATO COMPANY, INC., a California corporation.

2. Plaintiff "Z" TOMATO COMPANY, INC. is, and at all times herein mentioned, was a California corporation, which maintained its principal place of business in Blythe, California.

APPENDIX H

A. DANIEL BACALSKI, JR.
STATE BAR NO. 056488
DAVID R. CATALINO
STATE BAR NO. 144552
BACALSKI & BYRNE
Attorneys at Law
225 Broadway, Suite 1200
San Diego, California 92101
(619) 239-4340
Attorneys for Plaintiffs - JIM ZENDER and "Z" TOMATO COMPANY, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 92-455-G (POR)

JIM ZENDER and "Z" TOMATO COMPANY, INC., Plaintiffs,

vs.

VLASIC FOODS, INC., Defendants.

AMENDED COMPLAINT FOR BREACH OF CONTRACT AND INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND DEMAND FOR JURY TRIAL

I

THE PARTIES

1. Plaintiff JIM ZENDER, hereinafter referred to as ZENDER, is, and at all times herein mentioned, an individual residing in the State of California. At all times he was the owner of "Z" TOMATO COMPANY, INC., a California corporation.

2. Plaintiff "Z" TOMATO COMPANY, INC., hereinafter referred to as Z, is, and at all times herein mentioned, was a California corporation, which maintained its principal place of business in Blythe, California.

APPENDIX I

A. DANIEL BACALSKI, JR. (SB# 056488)
KERRY F. O'SULLIVAN (SB# 163137)
BACALSKI & BYRNE
225 BROADWAY, SUITE 1200
SAN DIEGO, CA 92101
(619) 239-4340

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 92-455-G (POR)

JIM ZENDER dba "Z" TOMATO COMPANY, INC., Plaintiff,

vs.

VLASIC FOODS, INC., Defendant.

PROPOSED SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT AND INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND DEMAND FOR JURY TRIAL

I

THE PARTIES

1. Plaintiff, JIM ZENDER (hereinafter referred to as ZENDER), is, and at all times herein mentioned, an individual residing in the State of California. At all times he wa the owner of "Z" TOMATO COMPANY, INC., a California corporation.

2. Plaintiff "Z" TOMATO COMPANY, INC. (hereinafter referred to as "Z") is, and at all times herein mentioned, was a California corporation, which maintained its principal place of business in Blythe, California.

APPENDIX J

Forrest A. Hainline III, (Cal. Bar No. 64166)
5335 Wisconsin Ave., N.W., Ste. 440
Washington, D.C. 20015
(202) 966-1962

Christian F. Dubia, Jr., Bar No. 81733
PINTO & DUBIA, LLP
2 Park Plaza, Suite 300
Irvine, California 92714
(714) 955-1177

Attorneys for Defendant,
VLASIC FOODS, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 92-455-IEG (POR)

JIM ZENDER dba "Z" TOMATO, INC.,
Plaintiff,

v.

VLASIC FOODS, INC.,
Defendant.

[stamp—FILED; JAN 9 1997; CLERK, U.S. DISTRICT COURT; SOUTHERN DISTRICT OF CALIFORNIA]

DECLARATION OF CHRISTIAN F. DUBIA, JR. IN SUPPORT OF DEFENDANT VLASIC FOODS' MOTION IN LIMINE

DATE: January 17, 1997
TIME: 1:00 p.m.
COURTROOM: 13
TRIAL DATE: January 28, 1997

I, Christian F. Dubia, Jr., declare as follows:

1. I am an attorney at law licensed to practice before all of the Courts of the state of California and admitted to

practice before this Federal District Court. I am a partner in the law firm of Pinto & Dubia, LLP, attorneys of record for defendant Vlasic Foods, Inc. ("Vlasic"). I have personal knowledge of the facts stated herein and if called as a witness would and could competently testify thereto. This declaration is made in support of Defendant's Motion in Limine To Preclude All Testimony Regarding Damages To 'Z' Tomato Company, Inc.

2. According to the records on file with the California Secretary of State 'Z' Tomato Company, Inc. is a domestic stock corporation which was incorporated on April 15, 1982; its registered agent is James C. Zender who is also its President. On September 1, 1994, 'Z' Tomato Company, Inc.'s powers were suspended for nonpayment of the corporate franchise tax.

3. Attached hereto as Exhibit "A" and incorporated herein by reference is an original certificate of the California Secretary of State regarding the suspended status of 'Z' Tomato Company, Inc. based on failure to pay franchise taxes.

4. Attached hereto as Exhibit "B" and incorporated herein by reference is an original Corporate Status Inquiry Report from the California Secretary of State issued to me in response to my inquiry regarding the corporate status of 'Z' Tomato Company, Inc.

Executed on January 8, 1997 at Irvine, California. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

/s/ Christian F. Dubia, Jr.
Christian F. Dubia, Jr.

State of California

SECRETARY OF STATE

CERTIFICATE OF FILING AND SUSPENSION

I, BILL JONES, Secretary of State of the State of California, hereby certify:

That the corporation named below became incorporated under the laws of the State of California by filing its Articles of Incorporation in this office.

That on September 1, 1994, pursuant to the provisions of the California Bank and Corporation Tax Law, more particularly Section 23302 of the Revenue and Taxation Code, the Franchise Tax Board transmitted to this office the name of the domestic corporation named below whose corporate powers, rights and privileges were suspended under said law.

"Z" TOMATO COMPANY, INC.	1108788
Name	Corporation Number

Further, that the corporate powers, rights and privileges of said corporation were suspended on the aforesaid date, as in said Section 23302 provided, and remain suspended, reinstatement never having been effected.

[SEAL]

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this 7th day of January, 1997.

/s/ Bill Jones
Secretary of State

JT

APPENDIX K

A. DANIEL BACALSKI, JR. (SB# 056488)
KERRY F. O'SULLIVAN (SB# 163137)
BACALSKI & BYRNE
225 BROADWAY, SUITE 1200
SAN DIEGO, CA 92101
(619) 239-4340

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 92-455-IEG (POR)

JIM ZENDER dba "Z" TOMATO COMPANY, INC.,

Plaintiff,

vs.

VLASIC FOODS, INC.,

Defendant.

[stamp—FILED; OCT 12 1994; CLERK, U.S. DISTRICT COURT; SOUTHERN DISTRICT OF CALIFORNIA]

NOTICE OF APPEAL

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that JIM ZENDER dba "Z" TOMATO COMPANY, INC. in the above case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the oral ruling on October 20, 1993 and October 21, 1993, refusing to instruct the jury on the issue of emotional distress damages, the Ruling on Motion for Judgment as a Matter of Law or New Trial filed on January 24, 1994, the Supplemental Ruling on Motion for Judgment

filed on July 26, 1994, the Order Granting Summary Judgment filed on October 5, 1994, and the Judgment in a Civil Case, entered October 6, 1994.

DATED: 10/11/94 BACALSKI & BYRNE

By: /s/ A. Daniel Bacalski, Jr.
A. DANIEL BACALSKI, JR.
Attorney for Plaintiffs
JIM ZENDER and "Z" TOMATO COMPANY, INC.

DECLARATION OF PROOF OF SERVICE BY MAIL
(CP 1013(a) (3) and 2015.5}

Case Name: *Zender v. Vlasic*
Case No. : United States District Court Case No. 92-1576R(POR)

I, JULIE N. LUSCHEN, am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 225 Broadway, Suite 1200, San Diego, California 92101.

On October 11, 1994, I served the following document(s):

1. NOTICE OF APPEAL;
2. CIVIL APPEALS DOCKETING STATMENT;
3. TRANSCRIPT DESIGNATION AND ORDERING FORM; AND
4. REPRESENTATION STATEMENT.

on the parties listed herein by placing a true copy thereof in a separate sealed envelope for each addressee respectively, as follows:

Christian F. Dubia, Esq.
PINTO, GROMET & DUBIA
2 Park Place, Suite 300
Irvine, CA 92714-8513

[X] BY MAIL — As follows: I am "readily familiar" with my business' practice of collection and processing correspondence for mailing. In the ordinary course of business, items placed for collection are deposited for mailing with the United States Postal Service that same day, with postage thereon fully prepaid in San Diego, California.

[ ] BY FAX — As follows: I personally sent to the adressee's telecopier/facsimile number a true copy of the above-described document(s). Thereafter, I sent a true copy

in a sealed envelope addressed and mailed as indicated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 11, 1994, at San Diego, California.

/s/ Julie N. Luschen
JULIE N. LUSCHEN

APPENDIX L

STATE OF CALIFORNIA [SEAL]
FRANCHISE TAX BOARD
P.O. BOX 942857
SACRAMENTO, CA 94257-2021

Subject : CERTIFICATE OF REVIVOR
Corporate Name : Z TOMATO COMPANY, INC
Corporate Number: 1108788
Effective Date : 012297

This corporation has been relieved of suspension or forfeiture and is now in good standing with the Franchise Tax Board.

/s/ Sue Richmond
Enforcement Bureau